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No. 1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

RAILROAD YARDMASTERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Petrtioner's statement of jurisdiction failed to note the stays of the mandate. The Court of Appeals issued its opinion on March 4, 1964, and under the rules of that Court the mandate would have issued after March 25, 1964. On March 23 petitioner filed its Motion to Stay Mandate and by its Order dated March 28, the Court of Appeals granted a thirty-day stay from that date. Petitioner then filed its Motion to Extend Stay of Mandate, dated April 17, 1964, wherein it sought to have the stay extended until June 2,

1964. Pursuant to that Motion the mandate was stayed to and including May 15, and, since the petition was filed on that day, the stay continues in force until the disposition of the petition.

The District Court issued a temporary restraining order upon the filing of this case on October 10, 1962, which by agreement, remained in effect throughout the proceedings before that Court. The District Court's permanent injunction was entered on April 10, 1963.

QUESTIONS PRESENTED

The Court of Appeals has held that the District Court did not have jurisdiction to consider petitioner's suit for an injunction under the Railway Labor Act because the issue presented involved the interpretation of a labor agreement. Thus, the questions presented are:

1. Whether a claim that certain proposed action by a railroad cannot be taken unless a notice of intended change in existing labor agreements is served and progressed under the Railway Labor Act and a defense thereto that the proposed action is authorized by and in conformity with the terms of the existing labor agreements involves the interpretation or application of such agreements within the scope of Section 3 First (i) of the Railway Labor Act.

2. Whether the jurisdiction of the National Railroad Adjustment Board over disputes involving interpretation or application of railroad labor agreements is exclusive.

STATUTE INVOLVED

Petitioner has set forth certain provisions of the Railway Labor Act (45 U.S.C. § 151 *et seq.*) in Appendix A to its Petition. Section 2 Sixth of that Act is set out in Appendix A attached hereto.

AGREEMENT BETWEEN THE PARTIES

Excerpts from the labor agreement in effect at all times involved herein are set out in Appendix B attached hereto.

UNREPORTED DECISION CITED BY PETITIONER

Petitioner has cited the unreported decision rendered by the Fifth Circuit in *Aarico Airlines, Inc.* v. *Air Line Pilots Association* (No. 20931) .... F. 2d .... [55 LRRM 2982, 49 CCH LC ¶18,886]. (Petition, p. 21). That decision is set out in Appendix C attached hereto.

STATEMENT

Petitioner's statement of the case, (Petition pages 3-10) does not present the facts sufficiently to develop the manner in which the case arose, the position of the parties on the question presented or the holding of the courts below. We therefore offer the following statement so that the Court may be more fully advised on these matters.

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Fifth Circuit which reversed a judgment of the United States District Court for the Northern District of Texas which had granted petitioner a permanent injunction enjoining respondent from abolishing yardmaster positions at Fort Worth "unless and until the [Respondent] shall have given proper notice under Section 6 of the Railway Labor Act of intent to make such changes, and shall have exhausted all procedures under the Railway Labor Act for negotiation, bargaining and mediation of major disputes * * *" (R. 231).

Section 6 of the Railway Labor Act is the Section which sets forth the procedure to be followed in order to change an agreement affecting rates of pay, rules or working conditions.

The Court of Appeals held that the District Court erred in entertaining jurisdiction, stating: "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedures set forth in the contract." 328 F. 2d 749, 753.

This holding was based upon the conclusion of the Court of Appeals that the dispute framed by the complaint was a "minor dispute" under the Railway Labor Act and the decisions of this Court in *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 325 U.S. 711 and *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, and its own holding in *Missouri-Kansas-Texas R.R. Company et al.* v. *Brotherhood of Locomotive Engineers et al.*, 266 F. 2d 335 (C.A. 5, 1959) which holding on the questions here pertinent was approved by this Court in *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528.

The facts upon which the Court of Appeals relied in holding that the District Court lacked jurisdiction are relatively simple and undisputed. The petitioner Union represents yardmasters on the respondent railroad. On October 8, 1962, respondent's superintendent notified its four yardmasters at Fort Worth (three of whom held regular positions, and one of whom held a relief position) that their positions would be abolished at the end of their respective tours of duty on October 10, 1962.[1]

Notice of this character was required by Rule 15 of the Agreement between the union and the carrier which provides as follows:

> "Rule 15. Yardmasters will be given 48 consecutive hours advance notice of reduction in force, with copy to General and Local Chairmen" (Appendix B, p. 32).

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[1] Typical of these notices is the following:

Fort Worth, October 8, 1962

Mr. J. R. Joblin
General Yardmaster
Fort Worth, Texas

Effective with end of tour of duty Wednesday, October 10, 1962, General Yardmaster Position, Fort Worth, Texas, is abolished.

/s/ R. A. Rorie

With respect to the carrier's right to abolish or establish yardmaster positions, Rule 16 (e) of the Agreement provides as follows:

> "Rule 16 (e). This agreement shall not be construed as an obligation to maintain or establish yardmasters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established" (Appendix B, p. 32).

These notices, pursuant to Rule 15 of the Agreement, do not involve the abolishment of yardmaster positions at any terminal other than Forth Worth. On the basis of his analysis of and familiarity with operations at Fort Worth, the local superintendent determined that yardmaster supervision at that terminal was unnecessary (R. 42-46).

Upon receipt of the notices by the individual yardmasters involved, petitioner filed its complaint seeking an injunction restraining the respondent from abolishing yardmaster positions at Fort Worth and from "transferring the duties of such classification to other employees", on the grounds that such action by the railroad violated Section 2, First and Seventh and Section 6 of the Railway Labor Act (49 U.S.C., Sec. 152, 156).

The complaint referred to the existence of a collectively bargained agreement between the union and the carrier governing the rates of pay, rules and working conditions of yardmasters, although no reference was made to the provisions of that agreement which are quoted above and which specifically recognize and affirm the carrier's right to abolish yardmaster positions.

The complaint did not allege that any notices had been served by the carrier or the union requesting any change or notification of the rates of pay, rules or working conditions governing yardmasters as a class or craft employed by the carrier. However, the complaint alleged that the procedures of Section 6 of the Railway Labor Act relating

to changes in agreement must be followed before yardmaster positions could be abolished (Complaint paragraphs 10, 11 and 13, R. 10-12).

The carrier's answer to the complaint alleged that the action complained of was entirely proper under the terms of the existing agreement and did not contravene any of the provisions of the Railway Labor Act; that the union's claim was basically one involving the interpretation or application of the existing agreement between the parties; that such a claim is subject to the exclusive jurisdiction of the National Railroad Adjustment Board after proper handling under the grievance procedures of the agreement and that the union thus had an adequate remedy at law (R. 22-24).

With respect to the specific terms of the agreement, the carrier's answer set out Rules 15 and 16(e), providing for notice to yardmasters of job abolishments, and specifically stating that the "agreement shall not be construed . . . as restricting the company's right to discontinue yardmaster positions."

In connection with the jurisdiction of the National Railroad Adjustment Board, the carrier's answer cited several Awards of the Board involving claims presented by the union under the existing agreement between the parties, identical in all respects to the claim here involved (R. 25). It was alleged that these awards clearly recognize and establish the jurisdiction of the Board over claims indistinguishable from that described in the complaint.

At the trial before the District Court counsel for the carrier urged the court to consider the legal defenses raised in the answer in advance of a hearing on the merits. This suggestion was overruled (R. 32-33). Evidence was then introduced subject to the railroad's objection that it related to matters exclusively within the jurisdiction of the National Railroad Adjustment Board (R. 35).

Generally the evidence introduced by the union related to the manner in which switching operations are conducted at Fort Worth and the circumstances which make yardmaster supervision of such operations unnecessary at that terminal (R. 43-45, 52-53, 58-59, 160).

Much of the testimony introduced by the union involved detail as to the activities of yardmasters in general, and to some extent the specific activities of yardmasters at the Fort Worth terminal (R. 90-92, 134-156). Officers of the Union testified at some length on this subject (R. 89-118).

The testimony also showed that the union has presented many claims to the National Railroad Adjustment Board based on the abolishment of yardmaster positions on the Respondent Railroad and on other carriers on which it holds representation rights, and that the present suit is the first occasion on which the elimination of such positions has been challenged as a violation of the Railway Labor Act (R. 107-108, 114). Other evidence introduced by the union involved detailed description of the duties of engine foremen at the Fort Worth terminal, elicited from a witness who works most of the time as a yard helper rather than as engine foreman (R. 133). It also appears from this and other testimony that the yardmasters working at Fort Worth whose positions would be abolished by the notice in question hold seniority rights as engine foremen (R. 132-133). In the event of the abolishment of their positions, these employees would revert back to that status and would be working on the three shifts operated at Fort Worth as engine foremen, supervising the work of the switching crews (R. 132-133, 161).

During the course of the hearings, the various awards of the National Railroad Adjustment Board which have adjudicated claims by the Railroad Yardmasters of America against Respondent's parent Railroad Company arising from the elimination of yardmaster positions at other points on the lines of the carrier, were cited (R. 169-170).

These awards affirm the right of the carrier to eliminate such positions and also hold that the agreement "permits the yardmaster duties to be performed by certain classes of employes who are not yardmasters" (Award No. 967, National Railroad Adjustment Board (Fourth Division)).

In its Memorandum Opinion, the District Court stated the claim of the union to be "that the Railroad cannot take unilateral action designed to eliminate the yardmaster classification without having given notice under Section 6 of the Railway Labor Act and having exhausted the negotiation and mediation procedures under the Act" (R. 200). Since Section 6 governs the procedure to be followed in the event of "an intended change in agreements," the claim thus described clearly required a determination that the existing agreements prohibited the abolishment of yardmaster positions, as contemplated by the letter of October 8, and that a notice to change the agreement under Section 6 was required. The District Court then proceeded to interpret the agreement between the parties without any regard at all of the exclusive jurisdiction of the National Railroad Adjustment Board in the premises. The District Court held that "the bargaining agreement clearly contemplated that the work theretofore performed by yardmasters would continue to be done by them as long as it existed" (R. 223). It also held that the provisions of the agreement recognizing and affirming the carrier's right to "discontinue yardmaster positions now or hereafter established" did not permit "abolishing the classification of yardmaster" (R. 223). This characterization of the proposed action as "abolishing the classification of yardmaster" is apparently a reference to the fact that all of the yardmaster positions at Fort Worth (3 regular and 1 relief) would be abolished by the October 8, 1962, notices.

The Court thus proceeded to decide precisely the same questions of contract interpretation, involving the same agreement, as those determined by the Adjustment Board

in the Awards referred to above, with exactly opposite results.

The Court of Appeals after considering the basic facts of the dispute as set forth in the complaint and answer stated that the parties seemed to agree on the proposition that certain types of disputes arising between carriers and their employees may be of such a nature that the Railroad Adjustment Board has exclusive jurisdiction over them and that in such a case suit may not be filed in the courts until after the procedures provided for in the Railway Labor Act are complied with. Upon the basis of this court's holding in *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 325 U.S. 711, the court concluded that this case was one of the class in which the jurisdiction of the Railroad Adjustment Board is exclusive.

The Court of Appeals held that the petitioner had fallen into the error of assuming that whenever an issue between a carrier and a union relates to rates of pay, rules or working conditions, Section 6 must be invoked and that the Trial Court seemed to have concluded that the effect of the conduct proposed by the carrier, even though authorized by the contract, was of such major significance that it had to be deemed a "major dispute". The Court of Appeals stated:

> "It is clear that in solving the problem presented to it, the trial court actually construed the language of Rule 16(e) as not authorizing the discontinuance of the yardmaster positions, thus clearly demonstrating that it was rejecting the carrier's *construction* of the contract of employment.
>
> . . . .
>
> "We do not, of course, any more than did we in the M-K-T case *supra*, attempt to construe the contract. This is to be done by the appropriate tribunal. We do say that a defense based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. It is not a fictitious or merely color-

able issue. Before a trial can decide that the terminations at issue were not justified, it must construe the language of Rule 16(e)."

The Court of Appeals then concluded that the District Court erred in entertaining jurisdiction of this suit.

REASONS FOR DENYING THE WRIT

I.

The court below properly held that the issues here involved are within the exclusive jurisdiction of the National Railroad Adjustment Board

Under the Railway Labor Act, disputes which may arise either involve the formation of or changes in agreements concerning rates of pay, rules or working conditions, or the interpretation or application of such agreements (45 U.S.C., Sec. 152). With respect to the first category, known as major disputes, the procedures of negotiation, mediation, voluntary arbitration and emergency board consideration are provided by the Act. The second category, known as minor disputes, are subject to other provisions of the Act, including ultimate reference to the National Railroad Adjustment Board.

The distinction between the two types of disputes was discussed at length by this Court, in *Elgin, Joliet and Eastern Railway Company v. Burley*, 325 U.S. 711 (1945). The Court summarized the basic differences as follows:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore, *the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*
>
> "*The second class, however, contemplates the existence of a collective agreement already concluded or, at*

> *any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.* The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.
>
> "In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world." (Pp. 723-24) (Emphasis added).

Clearly petitioner's "claim is to rights accrued," and the situation is one where no effort has been made to "bring about a formal change in terms" of the applicable agreement. The protests made have arisen "incidentally in the course of an employment," namely the employment of certain yardmasters. All the tests announced by this Court in *Burley* are typically met in this case.

The jurisdiction of the National Railroad Adjustment Board over the present dispute is established beyond question by the classic case in this field, *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, which involved issues virtually identical to those raised here. In that case, the carrier abolished positions held by road conductors, represented by the Order of Railway Conductors, and established yard conductor positions, represented by the Brotherhood of Railroad Trainmen, to operate five trains. The conductors claimed that this change could not be made unless the procedures of Section 6 of the Act were followed while the carrier contended that its existing agreements permitted the action complained of and that the procedures of Section 6, relating to intended changes in agreements were inapplicable. This Court held that these conflicting contentions clearly established that the dispute involved an inter-

pretation of the agreements upon which the carrier relied and was thus referable to the Adjustment Board, stating:

> ". . . the only conduct which would violate § 6 is a change of those working conditions which are 'embodied' in agreements. But the answers here specifically denied that the O. R. C. [Order of Railroad Conductors] agreements provided that road conductors operate the five trains in question. This put in issue the meaning of the contracts that allegedly embodied the working conditions which the trustees were about to change. The court, therefore, had to interpret these contracts before it could find that § 6 had been violated." (326 U.S. at p. 565).

In *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 188 F. Supp. 721 (1960), aff'd 307 F. 2d 21 (C. A. 2, 1962), cert. denied 372 U. S. 954, the District Court held that a dispute over changes in assigned runs resulting in the elimination of 10 positions was a minor dispute. In that case, as here, the claim of the union was that the carrier must first proceed under Section 6 of the Railway Labor Act. Numerous other courts of appeal have characterized similar disputes as minor disputes, referable to the National Railroad Adjustment Board. See *Hilbert* v. *Pennsylvania R. Co.*, 290 F. 2d 881 (C. A. 7, 1961); *Norfolk and P. B. L. R. Company* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C. A. 4, 1957), cert. den. 355 U. S. 914 (1958) (dispute over change by carrier in reporting points of yard crews); *In re Hudson & Manhattain Railroad Company*, 172 F. Supp. 329 (1959), affirmed 267 F. 2d 941 (C. A. 2, 1959), cert. den. 363 U. S. 843 (1960) (dispute over the abolishment of trainmen's positions); *Louisville & Nashville Railroad Company* v. *Brown*, 252 F. 2d 149 C. A. 5, 1958; *International Assn. of Machinists* v. *Eastern Air Lines*, 320 F. 2d 451 (C. A. 5, 1963); and *Brotherhood of Locomotive Firemen* v. *Central of Georgia Ry.*, 199 F. 2d 384 (C. A. 5, 1952); cert. den. 345 U.S. 908 (1953). The disputes in all these cases are analogous to the present one which is also a minor dispute.

The inescapable fact that the present dispute is subject to the Adjustment Board's exclusive jurisdiction is also shown by the National Mediation Board's Report to Congress for the Fiscal Year ended June 30, 1962. That Board has been the agency charged with the administration of the Railway Labor Act for a period of almost thirty years. It is thus intimately familiar with the provisions of the statute and the judicial authority interpreting and construing it.

In this most recent report, the Board summarized this accumulation of experience and judicial construction of the Act with reference to the type of claim made by the union in the present case. It stated:

> "Applications for the mediation services of the Board frequently indicate a misunderstanding as to the jurisdiction of the National Mediation Board and that of the National Railroad Adjustment Board. *Such applications are received with the advice that a change made or proposed to be made by the carrier 'constitutes a unilateral change by the carrier in the working conditions of the employees without serving notice or conducting negotiations under section 6 of the Act.'* The Board is requested to take immediate jurisdiction of the dispute and call the carriers' attention to the 'status quo' provisions of section 6 of the Act, i. e., have the carrier withhold making the change in working conditions, or restore the preexisting conditions if the change has already been made, until the dispute has been processed by the National Mediation Board" (p. 27).

After quoting Section 6 of the Railway Labor Act, the Report of the Board continues:

> "The organization in these instances will contend that proposed changes by the carrier should not be made without following the procedures cited in section 6 above. *These changes may involve assignment of individual employees or crews in road passenger or freight service, relocation of the point for going on and off duty in yard service, reduction of the number*

of employees through consolidations of facilities and changes which arise from development of new and improved methods of work performance." (p. 27).

What the Board describes as the typical position of the organization is essentially the claim made by petitioner in this case, that changes of this kind cannot be made without following the procedures of Section 6 of the Act. Moreover, the changes described by the Board include "reduction of the number of employees" which is the situation here. The Board then discusses the position of the carrier in such cases as follows:

> "The carrier, on the other hand, will maintain *the procedure of notice and conference outlined in section 6 does not apply as the section has application only to those working conditions incorporated in written rules which have been made a part of the collective bargaining agreement with the representative of the employees and by which the carrier has expressly restricted or limited its authority to direct the manner in which certain services shall be rendered by its employees*" (p. 28).

This, in substance, is the position of the carrier in this case. The Board then concludes that such disputes are referable to the Adjustment Board:

> "It is clear then that disputes of this nature involve a problem as to whether the proposed change can be instituted without serving a notice of intended change in the agreement on the other party. *This raises a question of application of the existing agreement to the pending proposal. Such a dispute is referable to the National Railroad Adjustment Board.* On the other hand, if it is contended by the organization that the carrier has no right to make the proposed changes, and the carrier maintains that it is not restricted by the terms of the agreement from making the change, then the dispute pertains to the question of what the agreement requires and the dispute should be referred to the National Railroad Adjustment Board in accordance with section 3 of the Railway Labor Act for decision" (p. 28).

Thus the Board in its lengthy administration of the Act has interpreted it to require submission of disputes such as the one here involved to the National Railroad Adjustment Board.

The jurisdiction of the National Railroad Adjustment Board is also most clearly illustrated by the proceeding before that agency instituted by petitioner on other occasions. The union was the claimant in the proceedings before the Fourth Division of the National Railroad Adjustment Board which eventuated in the awards cited in the carrier's answer (R. 25). All of these claims presented to the Adjustment Board by the union were based on the abolishment of yardmaster positions and the claim that duties of yardmasters had been transferred to others. In all essential respects therefore the claims presented to the Adjustment Board by the union were the same as the claim incorporated in the present complaint.

All that the union has done in attempting to avoid the jurisdiction of the National Railroad Adjustment Board in the present case is to add the conclusion of law that the proposed action of the carrier in abolishing the yardmaster jobs at Fort Worth is a violation of Section 2, Seventh and Section 6 of the Railway Labor Act. In other words, the union in the present case presented a claim to the District Court which contained all of the constituent elements of the claims which it had previously presented to the National Railroad Adjustment Board, but attempted to evade the jurisdiction of that Board by characterizing the proposed carrier action as a violation of the Railway Labor Act. This characterization by the union, however, does not establish that fact. This is particularly obvious when the terms of Section 2, Seventh and Section 6 of the Act, which are allegedly violated here, are considered. As previously stated, those Sections of the Act govern the procedures to be followed when one of the parties to an existing agreement proposes to change the

terms of the agreement, applicable to its employees as a class. In order to determine that those Sections apply to the action involved here, it is thus necessary to examine the contractual relationship between the parties and to determine whether the carrier has the right to proceed under the agreement, as is claimed in the answer which has been filed. This analysis demonstrates that petitioner's effort to change labels cannot succeed. The Adjustment Board awards referred to illustrate that there are substantial and fundamental questions of contract interpretation involved in the kind of claim presented by the union to the District Court. It is not the label which petitioner chooses to attach but the essential nature of the dispute as illustrated by these awards and the authorities which have been cited, which govern its classification as a major or a minor dispute.

Just over a year ago this Court emphatically reiterated its holdings that the jurisdiction of the Adjustment Board in cases such as this is exclusive, saying:

> "The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes. The right of one party to place the disputed issue before the Adjustment Board with or without the consent of the other, has been firmly established. *Brotherhood of R. R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. at 34, 77 S. Ct., at 637. And the other party may not defeat this right by resorting to some other forum." *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville R. Co.*, 373 U.S. 33, 38.

II.

The petition fails to state any cognizable ground for granting the writ

Petitioner vainly tries to create the impression that this Court's decision in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, justifies the writ, but the plain fact is that *Pitney* clearly requires that the writ be denied. Although petitioner attempts to distinguish *Pitney* and set itself apart from the effect of that decision, it cannot escape the clear meaning of that case.

The Court below properly held that the District Court had no jurisdiction to construe a labor agreement or to decide the issue involving the interpretation of that agreement. The Railway Labor Act clearly prescribes the procedure to be followed and, as indicated above, this Court has clearly held time and again that those procedures *must* be followed.

The interpretation and construction of a provision in a labor agreement is delegated solely and exclusively to the Railroad Adjustment Board by the provisions of Section 3 of the Act. It is apparent that the Court below properly applied those provisions and it is equally apparent that petitioner would distort them. It is in this same context that petitioner significantly misconstrues the decision of this Court in *Pitney* (*supra*).

It is a basic and established proposition that the benefits to be derived, upheld, and enforced under a railroad labor agreement involve a two-step procedure. When the interpretation and construction of an agreement is involved, that facet of the case is delegated solely and exclusively to the Railroad Adjustment Board. It is only if that body in its expertise construes that there is in fact a right subject to enforcement that the minimum residual of jurisdiction in the judiciary can be brought into play. That is the second step in the procedure which petitioner misconstrues.

The Court below was dealing with the first step in the procedure when it properly held that a court lacks jurisdiction to construe a labor agreement. The *Pitney* case cited by petitioner (Petition, pp. 11, 19, 20) discussed both the first and the second step of the procedure involved. The term "equitable discretion" relied upon so heavily by petitioner must of necessity be read in context and in conjunction with the language before and following that term. When dealing with the first step of the procedure, this Court said in *Pitney:*

> "*Only after the Adjustment Board acts, but* not until *then*, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O.R.C. *can not show* irreparable loss and inadequacy of the legal remedy." (Emphasis supplied) l.c. 326 U.S. 567.

Regardless of the faulty reasoning applied by petitioner, the end result in the *Pitney* case is the same result reached by the Court below in this case.

Petitioner is relegated to proceeding before the Railroad Adjustment Board which has the exclusive jurisdiction to decide whether or not the individual employees involved have a right subject to enforcement. If that administrative body decides there is a right in existence, then and only then may a court enforce that right (45 U.S.C.A. § 153(p)). Petitioner here has consistently misconstrued the provisions of the Railway Labor Act enacted on the subject and regardless of the misconstruction and citation out of context of certain passages of the *Pitney* case, it cannot bring itself within any benefits it assumes to be granted there.

The law as it applies to this situation has been enunciated by this Court time and again to the point where it should be ingrained in the minds of all dealing with the Railway Labor Act.

In *B. & O. R. Co.* v. *United Railroad Workers*, 271 F. 2d. 87 (C.A. 2, 1959), the Second Circuit Court aptly described the function of a court in situations such as this case presents, saying:

> "Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute" (271 F. 2d 87 at p. 91).

This position has been firmly established and recognized by this Court in *P. R. R.* v. *Ruehlik et al*, 352 U.S. 480 (1957); *Pennsylvania R. R. Co.* v. *Day*, 360 U.S. 548 (1959); *Slocum* v. *Del., Lackawanna and Western R. Co.*, 339 U.S. 239 (1950); *State of Calif.* v. *Taylor*, 353 U.S. 553 (1957).

It is apparent that petitioner was mistaken in its search for a remedy when it sought the aid of the district court because a court has no jurisdiction in the premises at this stage of the procedure.

In a rather drastic attempt to establish that there has been some overriding wrong done by the Court of Appeals, petitioner tries to leave the impression that the railroad in some ways failed to meet its duty to bargain under the Railway Labor Act. (Petition, pp. 12-13). What the statute requires in this respect, however, depends on a determination as to whether the dispute in question is a major or minor dispute. What the petitioner seeks is not an opportunity to confer in the manner provided for the settlement of disputes over the interpretation or application of agreements, instead it seeks a determination that the procedures applicable to major disputes must be exhausted by the carrier prior to the abolishment of yardmaster positions at Fort Worth. Appropriate opportunity to confer is available to the union, if and when it desires conferences, under the provisions of the statute and the existing agreement, which govern the handling of disputes involving the interpretation or application of agreements.

Section 2, First, of the Railway Labor Act (45 U. S. C. A., Section 152, First) imposes the obligation on employees and employers to make every effort to settle all disputes, including those arising out of the application or interpretation of existing collective agreements. This section is a preliminary statement of the purpose and policy of the provisions of the Railway Labor Act which follow: In *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U. S. 323 (1943), this Court stated:

> "Nor does § 2, Second make justiciable what otherwise is not. . . . But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands." (p. 334).

With respect to disputes over the interpretation or application of existing agreements, these "particularized commands" first appear in Section 2, Sixth, which provides as follows:

> "Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) that the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties" (45 U. S. C. § 152, Sixth).

Under the agreement now in effect between the carrier and the union, Rules 11 and 12 prescribe in detail the handling of disputes growing out of the interpretation or application of existing collective bargaining agreements (Appendix B, hereto). Such procedures are sanctioned by the second proviso of Section 2, Sixth. A claim must first be presented in writing to the appropriate carrier officer. In the present case no such claim has been presented and thus the occasion for conference has not arisen. Furthermore, there has been no request for conference under the provisions of Section 2 Sixth (Appendix A hereto).

Such conferences and the related procedures which are appropriate to the handling of disputes involving interpretation or application of agreements do not, of course, impose any obligation on the carrier to refrain from pursuing the action with respect to which the claim is made. As the Court pointed out in *Baltimore & Ohio R. R. Co. v. United Railroad Workers*, 271 F. 2d 87 (C.A. 2, 1959), which involved the abolishment of all firemen positions (the entire firemen classification) on diesel tug boats:

> "Until management announced its decision, the unions had no grievance and *nowhere in the Act is to be found any intimation that management must consult with union representatives before taking such action*" (p. 90).

The conferences and negotiations which are appropriate in a dispute over the interpretation or application of an existing agreement are contemporaneous with the handling of a specific claim under the procedures of the governing agreement and the Railway Labor Act. There is no obligation upon the carrier to confer and consult with the organization prior to taking the action with which the organization disagrees.

It is clear, however, that the negotiations to which petitioner refers are not negotiations of the kind appropriate to the handling of disputes over the interpretation or

application of an existing agreement. Petitioner instead seeks to require the carrier to pursue all of the procedures of the Railway Labor Act appropriate to the handling of so-called "major disputes." If petitioner is correct, the carrier cannot exercise its right under the agreement to abolish yardmaster positions unless the following steps have been taken: a 30-day notice must be given under Section 6 of the Railway Labor Act and a time and place must be fixed for conferences. After these and subsequent conferences have been held either party to the dispute may invoke the services of the National Mediation Board under Section 5 of the Act.[1] Representatives of the Board will then intervene and mediation conferences will ensue. If mediation by the Board proves unsuccessful it may then proffer arbitration. If either party to the dispute declines arbitration, the Board is authorized to close its files, retaining, however, the authority under Section 10 of the Act to recommend to the President of the United States that an Emergency Board be created to investigate and report with respect to the dispute.

The creation of such a Board, pursuant to the recommendations of the National Mediation Board, ordinarily results in hearings and other efforts by the Board to develop the facts with respect to the dispute. Within 30 days after its appointment, unless the time is extended by stipulation of the parties, the Emergency Board is required to submit its recommendations and report to the President of the United States. After the Board's report

[1] In this connection, it should be noted that the National Mediation Board has interpreted the Act to require submission of disputes such as the present one to the National Railroad Adjustment Board. Application for mediation in such disputes, according to the National Mediation Board, "indicate a misunderstanding as to the jurisdiction of the National Mediation Board and that of the National Railroad Adjustment Board" (National Mediation Board's Report to Congress for the Fiscal year ended June 30, 1962, pp. 27-28). See pp. 13-15, *supra*.

is issued, the parties are required to confer and negotiate for the purpose of attempting to dispose of the dispute on the basis of the recommendations made by the Board. If these negotiations are unsuccessful either party may resort to so-called "self-help" after the expiration of 30 days from the time of the Board's report. During this entire period, which ordinarily requires many months, and sometimes requires several years, the carrier is required to maintain the status quo in accordance with the provisions of Section 6 and Section 10 of the Railway Labor Act. Furthermore, at the end of these time-consuming procedures the organization is free to strike to prevent the carrier from effectuating the change which is the subject of the dispute. Thus, when petitioner asserts that it wishes only an opportunity to sit down and negotiate with the carrier, it is in reality asking the Court to require adherence to the procedure just described and to prohibit the carrier from taking any action during the time required to exhaust these procedures.

From the foregoing it is obvious that once the determination is made that a dispute under the Railway Labor Act is either a major or a minor dispute, the bargaining processes are clearly spelled out. In this respect the Railway Labor Act differs from some other labor statutes. For this reason we suggest that petitioner's reliance upon the granting of a writ in *Fiberboard Paper Products Corporation* v. *NLRB*, 322 F.2d 411 (C.A.D.C. 1963) certiorari granted, 375 U.S. 963, (Petition, pp. 13-14) is misplaced. Regardless of the problems which may exist under other statutes in this respect, the requirements of the Railway Labor Act are well defined and precise and the granting of the writ for the purpose of resolving the difficulties exemplified by the so-called *Fiberboard* case does not in any way support the claim that a writ should be granted in this matter.

Petitioner implies that the decision of the Court below has substantially changed pre-existing rights and obligations under the Railway Labor Act, stating:

> "This adverse effect of the decision has already been felt, however, for on April 15, 1964, the Fifth Circuit rendered a decision in *Aaxico Airlines, Inc.* v. *Air Line Pilots Association* (No. 20931) · F. 2d [55 LRRM 2982, 49 CCH LC ¶18,886], on the authority of its opinion in the instant case, . . ." (Petition, p. 21)

An examination of the *Aaxico* case, however, reveals that petitioner greatly over emphasizes the court's reliance on the *Yardmasters* case. The only citation of the *Yardmasters* case in the Aaxico opinion is:

> "The answer to this question is found in determining whether the dispute is what has generally been recognized in cases arising between carriers and their employees as a 'minor' dispute or a 'major' dispute. This terminology, used by the Supreme Court in *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, was discussed by us in a recently decided case, *St. Louis, San Francisco & Texas Rwy. Co.* v. *Railroad Yardmasters of America, AFL-CIO*, 5th Cir. . . . . F. 2d . . . . , No. 20570, decided March 4, 1964. Pointing out, as we did, in that opinion that the court has adhered to the distinction between minor disputes and major disputes we there said, 'It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedure set forth in the contract.'
>
> "We thus recognized what has always been the distinction between the two types of disputes. If 'the dispute relates either to the meaning or proper application of a particular provision [of an existing agreement] with reference to a specific situation or to an omitted case,' *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, it is a minor dispute no matter

how seriously it may affect the parties to the contract." (Appendix C, p. 41; *infra*)

Obviously the Court of Appeals did not consider that it was establishing any new rule by its decision in this case, but rather it was following the well established principles announced in *Burley, supra*. We note in passing that this is not the first time that petitioner has tried to use the *Aaxico* case to delay decision in this case. Beginning in the District Court similar requests for delay have been based upon the existence of that case.

We respectfully submit that petitioner has wholly failed to establish that a writ should be granted.

III.

This Court has consistently denied certiorari in cases where similar issues have been presented

Petitioner seeks to have this Court review principles so firmly established that certiorari has been denied to other petitioners time and again when the issues have been identical to the issues now presented. Some of the recent cases are:

In 1963, certiorari was denied in *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, 188 F. Supp. 721 (1960), aff'd 307 F. 2d 21 (C. A. 2, 1962), *cert. den.* 372 U.S. 954. There the District Court held that a dispute over changes in assigned runs resulting in the elimination of 10 positions was a minor dispute. In that case, as here, the claim of the union was that the carrier must first proceed under Section 6 of the Railway Labor Act.

In 1961, certiorari was denied in the case of *Hilbert v. Pennsylvania R. Co.*, 290 F. 2d 881 (C. A. 7, 1961), *cert. den.* 368 U.S. 900. There again the carrier claimed authority under the labor agreement to take action to transfer

crews, and the union claimed that the carrier had no such authority under the agreement.

In 1960, certiorari was denied in *In re Hudson & Manhattan Railroad Company*, 172 F. Supp. 329 (1959), aff'd 267 F. 2d 941 (C. A. 2, 1959), *cert. den.* 363 U.S. 843. That case involved a dispute between the railroad and the union concerning the right of the railroad to promulgate new work schedules which would eliminate 17 jobs. There also the railroad pointed to its labor agreement as authority for the proposed action and the union denied that the agreement gave such right.

In 1958, certiorari was denied in *Norfolk and P.B.L.R. Company* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C. A. 4, 1957), *cert. den.* 355 U.S. 914. That case involved an issue between the railroad and the union concerning the right of the railroad to establish a new point for reporting and relief. The relative rights of the parties there could be determined only by an interpretation of the labor agreement.

Only last Monday, May 25, 1964, this Court denied certiorari in another such case, *King* v. *Atlantic Coast Line R.R. Co.*, 323 F. 2d 1005 (C. A. 5, 1963), No. 904 this Term. That case was a suit brought by railroad employees claiming that the railroad had unlawfully abolished their jobs and wrongfully assigned similar work to others. The Court of Appeals held that the District Court was correct in dismissing the case because it involved interpretation of the collective bargaining agreement and hence was within the exclusive jurisdiction of the National Railroad Adjustment Board.

Respondent here respectfully submits that the factual situation involved in the case presented by petitioner is indistinguishable from the foregoing cases in that the right of the carrier to take the action it proposed to take was based upon the labor agreement and the determination of the issues could be made only after interpreting that agreement. This presents a classic minor dispute.

CONCLUSION

We urge that by no standard is this case worthy of review by this Court. Not only is the decision below correct, but it is also evident that the Court of Appeals applied settled principles to a fact situation similar to facts considered by this Court many times. This case involves no new principles and petitioner does not even contend that the decision conflicts with any other Court of Appeals decision.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

In addition to the portions of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.) reproduced in Appendix A to the petition the following portion of that Act is pertinent.

"TITLE I

"Section 2.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

APPENDIX B

Excerpts from Agreement Between St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company and Railroad Yardmasters of America, which was attached to the Answer as Exhibit A (R. 27) and which was also Plaintiff's Exhibit 8A (R. 252).

Effective September 16, 1945.

Revised Effective February 1, 1957.

Except Where Otherwise Indicated.

Scope

Rule 1. (a) These rules shall govern the hours of service, working conditions and rates of pay of Yardmasters. The term "Yardmaster" as used in this agreement shall be understood to mean Yardmasters of all grades except as otherwise provided herein.

(b) One position of general yardmaster at each of the following terminals does not come under the scope of this agreement: St. Louis, Springfield, Monett, Tulsa, Oklahoma City, Kansas City, Memphis and Birmingham. The rules of this agreement do not apply to these positions. It is understood and agreed there shall be no restriction upon the company as to yardmaster or other duties which may be required of or performed by general yardmasters filling positions listed in this rule.

(c) This agreement does not change present practice of officers of the railway, agent yardmasters or footboard yardmasters directing or supervising switching or yard service.

Rule 11.

(b) A yardmaster having a claim or grievance arising out of the interpretation and application of these rules, or who considers himself unjustly treated in matters other than discipline, will, or his representative may in his behalf, present such claim or grievance in writing to the supervising officer. Should such a yardmaster not be satisfied with decision rendered, he or his representative may appeal the case up to and including the highest officer designated by the Management to handle such matters.

(c) The provisions of Rule 12 will govern in the presentation and handling of claims and grievances under this rule.

Time Limit on Claims and Grievances.

Rule 12. All claims or grievances arising on and after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 calendar days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 calendar days from the date same is filed, notify the employe or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled accordingly but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be taken within 60 calendar days from receipt of notice of disallowance and the representative of the Carrier shall be notified within that time of the rejection of his decision. Failing to com-

ply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60 calendar day period for either a decision or appeal, up to and including the chief officer of the Carrier designated for that purpose.

(c) The procedure outlined in paragraphs (a) and (b) pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer except in cases of appeal from the decision of the highest operating officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest officer shall be barred unless within 6 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 6 months' period herein referred to.

(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 calendar days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service

in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employes they represent.

(f) This rule shall not apply to requests for leniency.

* * * *

Notice of Positions Discontinued.

Rule 15. Yardmasters will be given 48 consecutive hours advance notice of reduction in force, with copy to General and Local Chairmen.

* * * *

Rule 16. (e) This agreement shall not be construed as an obligation to maintain or establish yardmasters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established.

The following is a Memorandum of Understanding between the Carrier and the Union introduced as Defendant's Exhibit 1 (R. 298)

MEMORANDUM OF UNDERSTANDING.

Confirming verbal understanding reached in conference at St. Louis, Missouri today, it is understood paragraph (e) of Rule 1, agreement effective September 11, 1945, which reads:

> "This agreement does not change present practice of officers of the Railway, agent-yardmasters or footboard yardmasters, directing or supervising switching or yard service."

applies to instances where officers of the Railway, agent-yardmasters or footboard yardmasters are required to

perform certain yardmaster duties after the effective date of the agreement signed at St. Louis September 11, 1945 and effective September 16, 1945, as well as instances where this was being done at the time the agreement was signed.

Signed at St. Louis, Mo., April 18, 1946.

For FRANK A. THOMPSON,
Trustee

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Debtor

By C. P. KING
Assistant Chief Operating Officer

For ST. LOUIS, SAN FRANCISCO AND TEXAS RY. CO.

By C. P. KING
Assistant to Vice President

For RAILROAD YARDMASTERS OF AMERICA

By L. J. SMITH
General Chairman

W. F. MITCHELL
Secretary, General Committee

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20931

AAXICO AIRLINES, INC., *Appellant*,

v.

AIR LINES PILOTS ASSOCIATION, INTERNATIONAL, ET AL., *Appellees*.

Appeal from the United States District Court for the Western District of Texas.

(April 15, 1964.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This appeal raises the question whether the trial court had jurisdiction to construe what it found to be a subsisting agreement and to grant an injunction requiring the appellant to carry out the terms of such agreement as construed by the trial court.

The contest between the parties arose in the following manner:

Aaxico had for several years conducted an air transportation business with the use of C-46 aircraft on the basis of contracts with the United States Government. Beginning on June 16, 1956, Aaxico and ALPA had been parties to a collective bargaining agreement covering the employees flying its aircraft. The most recent of the collective bargaining agreements between the parties became effective on January 1, 1960. It provided that it was to continue in full force and effect until June 30, 1963, "and thereafter until each succeeding June 30, unless written notice of intended change is served in accordance with Section 6, Title I of the Railway

Labor Act by either party thereto at least 60 days prior to June 30, 1961, or June 30 of any succeeding year."[1] Prior to the expiration date of this last agreement, and without any specific written notice "of an intended change in agreements affecting rates of pay, rules or working conditions," on the occasion of Aaxico's losing its Logair (Government) contract as of June 30, 1960, and the leasing by it of approximately 25 C-46 aircraft to Capitol Airways, which company acquired the Logair contract from the Government, Aaxico furloughed all of its approximately 221 pilot employees by giving them two weeks' notice as required under the agreement. The notice contained the statement, "We cannot, at this time, see any possibility of a resumption of our Logair flying but if any change should take place you will be promptly notified."

Thereafter, although Aaxico had no other air transportation business to carry on until it was able to obtain further or new contracts, it did not dissolve but maintained a skeleton organization principally engaged in seeking new contracts including an effort to bid on the following year's Logair contract.

On October 17, 1960, during the stated life of the contract, Aaxico wrote to ALPA as follows:

> "Aaxico Airlines has suspended service in all forms of air transportation. We operated our last flights in early July of 1960 and have not had any pilots in our employ since that date.
>
> "On December 7, 1959 an Agreement and various Letters of Agreement and a Supplemental Agreement were signed between Aaxico Airlines, Inc. and The

[1] Section 6, Title I of the Railway Labor Act is a provision relating to the change "in agreements affecting rates of pay, rules or working conditions," and provides for the processing of bargaining through the Mediation Board before proposed changes in such existing agreements can be put into effect.

Air Line Pilots in the service of Aaxico Airlines, Inc. as represented by The Air Line Pilots Association International.

"This letter is to advise that the subject matter of the agreements listed in the Paragraph above no longer exists and therefore Aaxico Airlines considers these agreements terminated and of no further legal force and effect.".

Appellee replied on November 8, in part, as follows.

"We are not in a position to agree entirely with your statement. So long as AAXICO remains inoperative, this document lies dormant. In the event that operations of the Company are resumed, however, within the period in which AAXICO pilot employees have job tenure under this Agreement, this Association would require their reemployment by the Company."

This letter from Aaxico and the reply by ALPA had clearly created the first dispute between the parties. If this dispute was referable to a construction of the terms of the then existing contract, the procedure required by the Railway Labor Act was that the aggrieved party should have then filed a grievance and processed it through the System Board of Adjustment. If, on the other hand, this amounted to the thirty days' written notice contemplated by Section 6 of Title I of the Railway Labor Act of "an intended change in agreements affecting rates of pay, rules or working conditions," the parties were under obligation to arrange for the conference provided for in Section 6 of Title I and proceed through the Mediation Board until the negotiations for the new contract or the change in the old contract, were exhausted.

Neither of these procedures was followed. Instead, after Aaxico obtained new Government contracts, effective July 1, 1961, in the performance of which it used

DC-6A aircraft, a type of aircraft different from that which had theretofore been used in the prior operation and as to which pilot qualifications are different and more stringent, the Airline proceeded to obtain pilots through two pilot supply companies which, for the purpose of this appeal, we can assume amounted to nothing more or less than a service agent for the employment of pilots by the Airline itself. However, prior to the actual commencement of operation, on June 28, 1961, appellee, without having made any further demand or request for arbitration or mediation under either provision of the Railway Labor Act, brought suit in the Florida State Courts against the appellant seeking a construction of the contract, a declaration of the rights, and enforcement of the contract.[2]

The next step chronologically was that on July 20, 1961, after appellant had begun DC-6A operations, appellee addressed a letter containing the following to the President of Aaxico:

> "Pursuant to the Agreement between Aaxico Airlines, Incorporated and the air line pilots in its service, as represented by the Air Line Pilots Association, International, the pilots of Aaxico Airlines, Inc., hereby file this as a Group Grievance and request an investigation and hearing thereon. The grievance is based upon the Company's violation of the Agreement, specifically including Sections 13 and 24 thereof, by refusing to recall furloughed pilots."

Section 13 of the contract provides for seniority. Section 24 provides for the demotions and reduction of personnel.

[2] This suit was subsequently dismissed, but not until after this present action was brought in the federal court and appellant moved to stay this action pending a decision of the Florida State Court.

The President of the appellant replied on July 27th as follows:

> "Air Line Pilots Association International was advised on October 17, 1960, Aaxico Airlines considers that the agreement previously existing between Aaxico Airlines and the airline pilots in the service of Aaxico has been terminated. This company, therefore, could not possibly be in violation of such terminated agreement and your request for a hearing based upon an alleged group grievance is entirely out of line and, of course, cannot be considered by this company."

To this letter appellee replied on August 4th:

> "I am in receipt of your letter of July 27, 1961 denying my request for a hearing relative to a group grievance dated July 20, 1961. Since this decision is unsatisfactory to the affected pilots, I hereby request an appeal hearing.
>
> "It is requested that the Company send a copy of all hearing notices and decisions rendered in this case to the undersigned and to the Legal Department, Air Line Pilots Association, International, 55th Street and Cicero Avenue, Chicago 38, Illinois."

No action thereafter having been taken by either party relating to the matter of grievance, ALPA filed this suit on August 24, 1961.

The pleadings and proof adduced before the trial court presented the following issues:

> (1) Did the loss by Aaxico of its sole air carriage contract, followed by the leasing of its planes to another airline and the furloughing of all of its pilots, and the complete suspension of its operations pending the obtaining of a new contract, either constitute a termination of the collective bargaining agreement

then in effect or did it warrant Aaxico in treating it as terminated by its unilateral action?

(2) What tribunal is appropriate under the National Railway Labor Act to decide issue No. 1?

(3) If the agreement between Aaxico and ALPA remained in effect through the date of expiration, June 30, 1961, notwithstanding the circumstances mentioned in issue No. 1, were any of the rights of ALPA and its members under such agreement violated upon the occasion of Aaxico's reengaging in air carriage under the contracts it obtained to be effective July 1, 1961?

(4) If such rights were violated, what tribunal should make these determinations?

(5) Did the district court have jurisdiction over this controversy and, if so, to what extent?

The trial court held that the first issue was to be answered in the negative. It decided on the basis of the facts, which were undisputed so far as actually bear on *this* issue, that the loss of the Logair contract with the Government by Aaxico and its complete suspension of operations pending the negotiation of a future contract, which occurred approximately one year later, neither amounted to a termination nor did it justify Aaxico in terminating it unilaterally.

Thus, the trial court also answered the second issue. It decided that it was the proper tribunal to pass on this legal question.

The trial court also answered issue No. 3 by stating that it had jurisdiction to determine that under the contract there were certain rights both of ALPA and of its members that were violated when Aaxico hired new pilots, and paid them different rates of pay than provided for under the agreement and when it hired the new pilots

without reference to the seniority and other provisions of the existing agreement.

The court, thus, also decided issue No. 4, partially, to the effect that it was the proper tribunal to determine what rights under the contract had been violated, but it also decided that there were certain other contract disputes that should be referred, following grievance procedures as outlined in the agreement, to the System Board of Adjustment.

Finally, the court answered issue No. 5, both by the action it took in resolving issues Nos. 1 and 3, but also by concluding that it had the power to require Aaxico to assure the setting up of a System Board of Adjustment in order that grievance procedures could be pursued as provided for under the Railway Labor Act.

We conclude that the jurisdiction of the court was considerably more limited than that which it exercised. To the extent that the trial court could find on the record before it that the appellant had failed to make available the grievance machinery in order to permit a reference to a System Board of Adjustment, and to the extent that the court could find that ALPA had not either acquiesced in or abandoned any rights which it may have had under the contract, if not terminated, it would be within the competence of the trial court to have required Aaxico to assure the availability of grievance procedures and a System Board of Adjustment. In point of fact, Aaxico did not appeal from that part of the trial court's order which required it to "join with plaintiff Air Line Pilots Association in establishing a System Board of Adjustment to function under said contract; and give effect to such Sytem Board, as set out in the System Board Agreement of said contract."

This is another one of those cases which, when brought to court, poses the preliminary question whether the relief sought is relief which can appropriately be granted

by the court or which, under the carefully considered scheme of the Railway Labor Act, must be resolved by the System Board of Adjustment. The answer to this question is found in determining whether the dispute is what has generally been recognized in cases arising between carriers and their employees as a "minor" dispute or a "major" dispute. This terminology, used by the Supreme Court in *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, was discussed by us in a recently decided case, *St. Louis, San Francisco & Texas Rwy. Co.* v. *Railroad Yardmasters of America, AFL-CIO*, 5th Cir. ..... F. 2d ....., No. 20570, decided March 4, 1964. Pointing out, as we did, in that opinion that the court has adhered to the distinction between minor disputes and major disputes we there said, "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedure set forth in the contract."

We thus recognized what has always been the distinction between the two types of disputes. If "the dispute relates either to the meaning or proper application of a particular provision [of an existing agreement] with reference to a specific situation or to an omitted case," *Elgin, Joliet & Eastern Rwy. Co.* v. *Burley*, 325 U.S. 711, it is a minor dispute no matter how seriously it may affect the parties to the contract.

With these general principles in mind we look first to the first issue stated above. Clearly, the complaint by which this litigation was started was based on the theory that the agreement between Aaxico and ALPA was a continuing one and was still in effect. The complaint showed that the appellant had proceeded on the theory that the contract had been terminated. How, then, was this question to be decided? Obviously, it could be decided only by inter-

preting the agreement itself and thus it was a minor dispute; one which under the completely uniform holdings of the courts must be submitted to the grievance procedures with final decision to be made by the System Board of Adjustment. We conclude, therefore, that it was beyond the competence of the trial court to resolve this dispute.

So, too, with respect to the other interpretations made by the trial court of the obligations of the parties under the terms of the agreement. For instance, whether, assuming the contract was still in effect, Aaxico was required to recall for the operation of the new equipment requiring greater or different skills, the pilots who had previously been furloughed, was necessarily to be determined from the contract of employment. The failure of Aaxico to recall the pilots and, in their place, to accept pilots furnished by another agency, if objected to by ALPA or any of the plaintiffs, was the proper subject of grievance procedures in the traditional sense. Thus, it was beyond the competence of the trial court to resolve these issues as well, of course, as the issue of whether the pay requirements under the contract were to be carried out.

We think it clear that if the proof shows that Aaxico made impossible the carrying out by the appellees of the grievance procedures to the System Board of Adjustment, the trial court had jurisdiction to order Aaxico to carry out its obligations under the contract to make arbitration and decision of these matters effective. *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515.

The undisputed facts present in this case probably warrant a comment that, regardless of how the trial court finally determines the factual issues, a normal processing of the disputes immediately after they arose would have proved the efficacy of the plan contemplated in the Railway Labor Act, whereas the failure to resolve these disputes promptly has resulted in litigation that will inevitably

lead to serious unanticipated loss to one party or the other. This is true because if the question of the termination of the contract had been resolved in the fall of 1960 at a time when no pilots were employed or sought to be employed by Aaxico, this whole dispute might well have been resolved before the commencement of the operations by the use of new equipment July 1, 1961. We do not intimate a judgment on the issue whether the circumstances existing after the exchange of correspondence at that time amounted to either an acquiescence by appellees or a waiver of a right to pursue the dispute further, but we do hold that the extent of the rights of the appellees thereafter was to present their contention to the district court that they were unable to pursue their grievance procedures because of stated failures on the part of the appellant to make such processes available. Thereupon the trial court could promptly have resolved this issue either by directing submission of the questions to the grievance procedures or by holding that the appellees no longer had such rights.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.